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In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS, ETC., PETITIONER

v.

ITT LIGHTING FIXTURES, INC., ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner was chosen as bargaining representative by a majority of employees at respondent ITT Lighting Fixtures, Inc.'s facilities in Southaven, Mississippi, and Memphis, Tennessee, in an election conducted under the auspices of the National Labor Relations Board on February 16, 1979. ITT objected to the election results on the ground that the pro-union activity of certain "group leaders" impermissibly interfered with the employees' free choice. The Board rejected that challenge, finding that the group leaders, although supervisors within the meaning of the National Labor Relations Act, had no substantial authority to affect the employment status of other employees and therefore that their activities on behalf of petitioner did not impair the

employees' freedom of choice in the election. Pet. App. 32a-34a.[1]

Petitioner was certified as bargaining representative on May 9, 1980 (Pet. App. 63a-68a). ITT thereafter refused to bargain, and, upon charges filed by petitioner, the Board found that the company had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by its refusal to bargain (Pet. App. 51a-62a). The Board ordered ITT to recognize and bargain with petitioner.

2. The court of appeals refused to enforce the Board's order (Pet. App. 10a-30a). The court found that the Board's Regional Director, whose decision the Board had adopted in the underlying representation proceeding, had failed to make sufficient findings with respect to the precise supervisory authority of the group leaders and had failed to articulate sufficiently the reasoning underlying the conclusion that their pro-union activities did not impair the employees' free choice (*id.* at 22a-30a). The court remanded the case for further findings by the Board.

3. On remand, the Board reaffirmed its earlier decision (Pet. App. 31a-50a). It examined the supervisory authority of those group leaders who engaged in activity on behalf of petitioner[2] and found that they had no independent authority to hire, fire, promote, lay off, reward, discipline, or issue formal warnings to employees. Thirteen of them had the independent authority to assign and direct work; seven had

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[1]The parties stipulated that a number of group leaders engaged in one or more of the following activities: attended union meetings and encouraged other employees to attend; solicited authorization cards and signed cards themselves; wore pro-union T-shirts; spoke out and campaigned for the union; met with the union's international representative; and had dinner with a union representative (Pet. App. 17a-19a).

[2]The Board determined that 15 of 31 group leaders had engaged in some form of pro-union activity (Pet. App. 36a).

the authority to allow employees to leave work early and to approve overtime; and four could adjust grievances. *Id.* at 32a-33a, 48a. The Board concluded on the basis of these findings that the "type of day-to-day supervisory authority possessed by these group leaders simply * * * does not warrant a finding that the retaliatory potential of the group leaders was sufficient to make their involvement in the union campaign coercive to employees" (*id.* at 49a). Further, the Board noted that no supervisor engaged in threats or any other acts "to make any employee fear possible retribution at a group leader's hands for failing to support the Union" (*ibid.* (footnote omitted)). Accordingly, the Board reaffirmed its earlier holding that the activities of the group leaders did not warrant setting aside the election and again ordered the company to bargain.

4. The court of appeals again refused to enforce the Board's order (Pet. App. 1a-9a). The court held that the Board erred by failing to consider, in addition to the power to retaliate, the power of the group leaders to reward employees by giving one employee an advantage over another.[3] The court independently examined the authority of the group leaders and concluded that five of them had the power effectively to recommend favorable or adverse action, and therefore that employees "could possibly have been influenced by the pro-union activity" of the five group leaders (*id.* at 9a). The court vacated the Board's order and set aside the election.

5. While the Board believes that the court of appeals erred in rejecting its finding that the supervisors possessed insufficient authority over the employment status of other employees to make their pro-union involvement coercive, and in setting aside the election, the Board did not file its

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[3]In fact, the Board did find that the group leaders lacked the authority to "reward" employees (Pet. App. 33a).

own petition for certiorari because in its view the disagreement between the Board and the court turns largely on the particular facts of this case. Such a fact-bound issue is not one that this Court ordinarily would review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Petitioner seeks review on the ground that the court of appeals' decision is in conflict with decisions of other circuits over the proper legal standard to be applied in evaluating pro-union activities of supervisors. Petitioner contends (Pet. 6-11) that the Second Circuit holds supervisory pro-union conduct to a higher standard than do other courts of appeals and that it would set aside an election whenever the activities of supervisors could possibly have influenced employee free choice, whereas other courts of appeals would not set aside an election unless the pro-union activity contains express or implied threats of retaliation or promises of benefits. We submit that there is no such conflict.

In evaluating the effect of pro-union conduct by supervisors, the Board and the courts both generally examine all the circumstances, with particular emphasis on (1) the nature of the supervisor's authority and (2) the nature and extent of the pro-union activities. See *Delchamps, Inc.*, 210 N.L.R.B. 179, 180 (1974); *Flint Motor Inn Co., d/b/a Sheraton Motor Inn*, 194 N.L.R.B. 733, 734 (1971). It is generally true, as petitioner suggests, that pro-union conduct by low-level supervisors who lack significant authority to affect employees' working conditions or employment status will not invalidate an election unless the supervisors threaten employees, or promise them future benefits, in an effort to persuade them to support the union. Compare *NLRB* v. *Northeastern University*, 707 F.2d 15, 18 (1st Cir. 1983) (nonthreatening pro-union conduct by low-level supervisors not sufficient to invalidate election) with *NLRB* v. *Howard Johnson Motor Lodge*, 705 F.2d 932, 934-935 (7th

Cir. 1983) (threats by low-level supervisors were coercive of employees' right to choose freely) and *Marconi, Inc.*, 251 N.L.R.B. 46 (1980) (threats by pro-union supervisor warranted setting aside the election). However, the Board has never required the presence of threats or promises of benefit in order to find that supervisory pro-union conduct has impaired employees' free choice and therefore warrants setting aside an election. Where there are pervasive pro-union activities by supervisors who possess significant authority to affect working conditions or employment status, the Board will find such conduct to be coercive of the employees' right to choose a representative, notwithstanding the absence of threats or promises of benefit, if, under the circumstances, employees could reasonably fear or expect some future retaliation or grant of benefit by a pro-union supervisor. See, *e.g., Delchamps, Inc., supra*; *Flint Motor Inn Co., supra*; see also *Glomac Plastics, Inc.*, 194 N.L.R.B. 406, 409-410 (1971).

The cases cited by petitioner (Pet. 7-11) are not to the contrary. The courts in those cases accepted the general principle applied by the Second Circuit here — "an election is not per se invalid merely because there was some pro-union activity on the part of a supervisor. Rather, there must be a showing that the supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice in the election" (Pet. App. 15a-16a). See, *e.g., Fall River Savings Bank* v. *NLRB*, 649 F.2d 50, 56 (1st Cir. 1981); *NLRB* v. *Manufacturers' Packaging Co.*, 645 F.2d 223, 225-226 (4th Cir. 1981).[4] Although the courts in these cases, in sustaining the Board's conclusion that the supervisory conduct at issue

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[4]Petitioner suggests (Pet. 8) that the First Circuit expressly noted a conflict with the Second Circuit in *NLRB* v. *Northeastern University*, 707 F.2d at 18. Earlier in its opinion, however, the *Northeastern* court cited the court's decision in this case with approval for the proposition

was not likely to have a coercive effect, emphasized that the conduct did not involve threats or promises, the courts did not hold that those were the only factors that were relevant to a determination of that question. On the contrary, the courts considered all the circumstances, including the level of supervisory authority, to determine whether the supervisor's activity created the potential for future reprisal that would reasonably be likely to preclude employees from exercising a free choice in the election. See, *e.g.*, *Fall River Savings Bank* v. *NLRB*, 649 F.2d at 57; *NLRB* v. *San Antonio Portland Cement Co.*, 611 F.2d 1148, 1152 n.2 (5th Cir. 1980). Moreover, nearly all the cases cited by petitioner involved the isolated activities of only one or several supervisors, as opposed to the large number of pro-union supervisors involved here. See, *e.g.*, *NLRB* v. *Northeastern University*, 707 F.2d at 18; *NLRB* v. *St. Mary's Home, Inc.*, 690 F.2d 1062, 1069 (4th Cir. 1982); *NLRB* v. *San Antonio Portland Cement Co.*, 611 F.2d at 1151.

Respectfully submitted.

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that an election will be invalid if a " 'supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice.' " 707 F.2d at 17. To the extent the *Northeastern* court contrasted the court's decision in this case with its own, the comparison merely questions the result reached on the particular facts and does not reflect a different legal standard.